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No. 04-515

IN THE

Supreme Court of the United States

LARRY BILL ELLIOTT,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE VIRGINIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.2, the National Association of Criminal Defense Lawyers ("NACDL") and the Virginia Association of Criminal Defense Lawyers ("VACDL") respectfully request leave to file the attached brief *amici curiae* in support of Petitioner, Larry Bill Elliott. Petitioner has consented to the filing of the brief. Counsel for Respondent has not consented to the filing of the brief.

NACDL is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public

defenders, and law professors. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. NACDL has appeared as *amicus curiae* in this Court on numerous occasions.

VACDL – formerly the Virginia College of Criminal Defense Attorneys before it became an affiliate of NACDL – is a statewide organization of attorneys whose practice primarily focuses on the representation of those accused of criminal violations. VACDL seeks to improve the quality of justice in Virginia by working to ensure fairness and equality before the law.

In this case, the Virginia Supreme Court affirmed Petitioner's death sentence based upon a "vileness" aggravator, which the trial court applied without a narrowing construction. The vileness aggravator used by the jury to sentence Petitioner to death is virtually indistinguishable from the vileness aggravator that this Court held to be a violation of the Eighth Amendment in *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Amici*'s members are actively involved in representing defendants in capital cases. The members of both organizations have represented thousands of individuals charged with capital crimes. *Amici* can therefore bring the extensive experience of their members to bear on the issues before this Court. Moreover, because the Virginia Supreme Court's decision conflicts with this Court's precedents and violates the Constitution, *amici* have an interest in having that decision overturned.

NACDL and VACDL can bring an important perspective to the issues before this Court and, for the foregoing reasons, respectfully request leave to file the attached brief *amici curiae* in support of the petition.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The interest of *amici curiae* is set forth in the accompanying Motion for Leave to File Brief *Amici Curiae*.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

Almost thirty years ago, this Court raised questions about the vagueness of the "vileness" aggravator in Georgia's death penalty scheme. *See Gregg v. Georgia*, 428 U.S. 153 (1976). Four years later, after the Georgia courts failed to heed the Court's concern, the Court invalidated a death sentence, finding that the guidance given to the jury by Georgia's vileness aggravator did not "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (footnote omitted). Since *Godfrey*, the Court has repeatedly reaffirmed the principle that a state that elects the death penalty has "a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.*; *see also Maynard v. Cartwright*, 486 U.S. 356, 363 (1988); *Zant v. Stephens*, 462 U.S. 862, 877 & n.15 (1983).

Despite having a vileness aggravator virtually identical to that at issue in *Godfrey*, the Commonwealth of Virginia has repeatedly failed to narrow its breadth to conform to the Eighth and Fourteenth Amendments and to this Court's ruling in *Godfrey*. As a result, Virginia's death-penalty scheme does not provide, as required, a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases where it was not." 446 U.S. at 433 (plurality opinion).

The result of Virginia's refusal to narrow its vileness aggravator is just what this Court predicted in *Godfrey* – a system of arbitrary and capricious punishment, which allows juries unbridled discretion to impose the ultimate penalty of death in virtually every case. As a review of Virginia capital

cases shows (Part I *infra*), Virginia juries – unguided by specific and definite instructions – can find vileness in any murder case, regardless of its facts. And the Virginia Supreme Court – applying contradictory and inconsistent standards -- has never once overturned a finding of vileness.

Virginia's refusal to comply with the Constitution and this Court's decisions is extraordinary, particularly when compared to the many states that have responded to this Court's decision in *Godfrey* by narrowing analogous aggravators and providing additional guidance to juries (Part II *infra*). Virginia's refusal to do what other states have done threatens the due process rights of criminal defendants in Virginia and the public's interest in the fair administration of justice (Part III *infra*). Defendants charged with capital murder in Virginia, facing death-qualified juries that are more likely to convict than other juries and total uncertainty as to the factors relevant to their sentencers' determination of "vileness," may consequently forfeit their right to contest their own innocence at trial.

Virginia's death-penalty scheme clearly violates the principles established in *Godfrey* and its progeny. This case presents the issue squarely, and the Petitioner clearly raised the issue at the trial court and in the Virginia Supreme Court (Part IV *infra*). *Amici* request that the Court grant the writ and direct Virginia, at long last, to comply with the Constitution and this Court's decisions. *See* S. Ct. R. 10(c) (review is appropriate where "a state court has decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court").

I. BECAUSE THERE ARE NO CLEAR OR OBJECTIVE STANDARDS, VIRGINIA JURIES AND JUDGES CAN FIND "VILENESS" IN ALMOST ANY MURDER CASE, LEADING TO ARBITRARY AND CAPRICIOUS RESULTS.

"[Where] discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189. In *Godfrey,* the Court held that an ambiguous instruction to the jury – that it could impose the death penalty if the murder was "outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery" – was so vague that it would permit the jury to find any murder to be "vile" and thus would result in the arbitrary and capricious imposition of capital sentences. 446 U.S. at 422; *see also Maynard*, 486 U.S. at 363 ("A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'").

To avoid that unconstitutional result, an "aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877. Moreover, "[a] statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty." *Richmond v. Lewis*, 506 U.S. 40, 46 (1992); *see also Maynard*, 486 U.S. at 364.

The vileness aggravator used in Virginia is the same vileness instruction used in Georgia prior to the *Godfrey*

decision. *Compare* Va. Code Ann. § 19.2-264.2 *with* Ga. Code § 27-2534.1(b)(7) (1978). Since *Godfrey*, the Virginia legislature and the Virginia Supreme Court have had numerous opportunities to do what this Court required: to amend the statute or to impose a limiting instruction for juries that would "narrow[] the class of persons eligible for the death penalty." *Zant*, 462 U.S. at 877.

Unlike other states (Part II *infra*), however, neither the judiciary nor the legislature in Virginia has complied with the Court's directive. Rather, Virginia has left its unconstitutionally vague vileness aggravator in place, to be applied by judges and juries across the Commonwealth without clear and objective standards. *See Godfrey*, 446 U.S. at 428. The only "clarifications" that the Virginia Supreme Court has provided sentencers consist of the same inadequate definitions of the terms "aggravated battery" and "depravity of mind" that existed before *Godfrey* was decided. According to the Virginia Supreme Court, an "aggravated battery" is "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish the act of murder." *Smith v. Commonwealth*, 248 S.E.2d 135, 149 (Va. 1978). "Depravity of mind" is "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Id.*

Neither of these definitions gives any additional guidance to juries or provides any principled basis for "distinguishing the few cases in which [the penalty] is imposed from the many in which it is not." *Godfrey*, 446 U.S. at 427 (plurality opinion) (internal quotation marks omitted; alteration in original); *see also* Melissa A. Ray, *'Meaningful Guidance': Reforming Virginia's Model Jury Instructions on Vileness and Future Dangerousness*, 13 CAP. DEF. J. 85, 89 (2000).

Indeed, they provide no more guidance than the aggravator invalidated in *Maynard,* which merely added the word "especially" to an otherwise unconstitutionally vague instruction. *See* 486 U.S. at 364.

The Virginia Supreme Court has made clear that it has no intention of narrowing these terms further or providing additional guidance to juries. In its view, the aforementioned definitions "are the only constructions rationally related to the commonly accepted connotation of the prefatory words 'outrageously or wantonly vile, horrible or inhuman,'" *Smith*, 248 S.E.2d at 149. Moreover, in blatant disregard of *Godfrey* and its progeny, the Virginia Supreme Court has held that "it is not reversible error for a trial court to refuse to define the statutory terms included in the aggravating circumstances upon which a sentence of death may be based." *Bunch v. Commonwealth*, 304 S.E.2d 271, 285 (Va. 1983); *see also Elliott v. Commonwealth*, 593 S.E.2d 270, 289 n.9 (Va. 2004) (acknowledging that the Virginia Supreme Court has never endorsed any jury instruction limiting the "vileness" aggravator).

As the Court predicted in *Godfrey*, by refusing to provide "specific and detailed guidance," Virginia today maintains a system under which all capital murders potentially meet the vileness standard. *See* Douglas R. Banghart, *A Quarter-Century of Death: A Symposium on Capital Punishment in Virginia Since* Furman v. Georgia, 12 CAP. DEF. J. 77, 79, 89-90 (1999); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases — The Standardless Standard*, 64 N.C. L. REV. 941, 987-89 (1986). Sentencers in Virginia have virtually unbridled discretion to impose the death penalty in murder cases, and the Virginia Supreme Court has never once overturned a finding of vileness.

As shown by an examination of capital cases decided in Virginia since *Godfrey*, it is impossible to derive any principled boundaries on the Commonwealth's vileness aggravator. The Virginia Supreme Court has given such elastic meaning to "aggravated battery" and "depraved mind" that these categories act effectively as catch-alls, sweeping within their potential scope almost any fact scenario.

For example, one factor used by the Virginia Supreme Court to determine vileness has been the number of bullets fired. The Virginia Supreme Court has repeatedly found that multiple gunshots are sufficient to support a finding of "aggravated battery" and hence vileness justifying the death penalty. *See Green v. Commonwealth*, 580 S.E.2d 834 (2003) (finding that multiple gunshots constituted "aggravated battery"), *cert. denied*, 124 S. Ct. 1448 (2004).

If multiple gunshots constitute "aggravated battery" and therefore establish the vileness predicate, one might assume that a single gunshot killing would not. Yet the Virginia Supreme Court has also determined that crimes involving a single gunshot can be "vile" if the victim sees the bullet coming because this represents psychological torture and therefore shows a "depraved mind." *See, e.g., Poyner v. Commonwealth*, 329 S.E.2d 815, 832 (Va. 1985).

Similarly, the Virginia Supreme Court has found that murders involving suffering by the victim and murders in which the victim dies immediately are both vile. If the victim dies slowly, the suffering caused may constitute an aggravated battery. *See, e.g., Edmonds v. Commonwealth*, 329 S.E.2d 807, 814 (Va. 1985) (finding aggravated battery where defendant left "the victim to suffer an interval of agony awaiting death, evinc[ing] a criminal animus more culpable than that involved in a battery which causes sudden

death."). If the victim dies instantly, however, it has been found the crime involves a "depraved mind," apparently because such killings are "execution-style." *See, e.g., Stewart v. Commonwealth*, 427 S.E.2d 394, 409 (Va. 1993) (finding aggravated battery even though both victims died instantly).

Other examples abound. In Virginia, multiple stab wounds have been held to demonstrate "aggravated battery" sufficient to meet the vileness predicate, *see, e.g., Reid v. Commonwealth*, 506 S.E.2d 787, 792 (Va. 1998) (finding that stabbing the victim many times sufficed for aggravated battery), but so has a single stab wound because it demonstrates killing in a "savage" and "methodical" manner. *See, e.g., Stout v. Commonwealth*, 376 S.E.2d 288, 292 (Va. 1989) (finding one stab wound enough to establish "aggravated battery").

Indeed, the Virginia Supreme Court would likely find the exact facts of the *Godfrey* case sufficient to support the death penalty – despite contrary instruction from this Court. And given the elasticity of Virginia's vileness aggravator, it could do so on any number of different grounds. Under Virginia Supreme Court precedent, the fact that Godfrey killed his victims with a shotgun would be sufficient, without more, to justify the death penalty. *See, e.g., Hudson v. Commonwealth*, 590 S.E.2d 362, 364 (Va. 2004) (upholding vileness finding due to the "maximum damage" the shotgun pellets caused the victims). The *Godfrey* Court, on the other hand, expressly noted that "it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle." 446 U.S. at 433 n.16.

The Virginia Supreme Court also could rely, if it chose, on the fact that Godfrey killed his wife first, then entered the

trailer and killed his mother-in-law. Under Virginia law, the few seconds of anticipation the mother-in-law felt while Godfrey entered the trailer and reloaded his gun could have been "psychological torture" sufficient for a finding of vileness. *See, e.g., Poyner,* 329 S.E.2d at 832 (victim seeing the gun and defendant letting victim see his face established "psychological torture"). But the *Godfrey* plurality did not even discuss this factor and "the trial judge, the prosecutor, and the jury did not believe that the evidence showed that either victim was tortured." 446 U.S. at 434 (Marshall, J., concurring).

Finally, because Godfrey killed his wife in front of his mother-in-law and his eleven-year-old daughter, the Virginia Supreme Court could find such a crime reflecting a "depravity of mind." *See, e.g., Green*, 580 S.E.2d at 848 (finding "depravity of mind" because victim was shot "in front of her husband"). In contrast, this Court found that this circumstance "cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." *Godfrey*, 446 U.S. at 433.

Indeed, in a case with facts very similar to *Godfrey*, a defendant was sentenced to death after a jury found the vileness aggravator to apply. The key distinction the Virginia Supreme Court found between that case and *Godfrey* was that the victims were shot from close range, which, in its view, was sufficient to show depravity of mind. *See Stewart*, 427 S.E.2d at 409.

This partial rendition of death-penalty cases in Virginia illustrates what this Court forewarned in *Godfrey* – where there is a lack of clear and objective standards, every murder becomes eligible for the death penalty, and the unbridled discretion given to sentencers leads to arbitrary and capricious results in violation of the Eighth and Fourteenth

Amendments. The Court should grant the writ in this case to address Virginia's refusal to comply with constitutional norms and to invalidate, once again, a death sentence based on the vague vileness aggravator that it found unconstitutional twenty-four years ago.

II. VIRGINIA PRESENTS A STARK CONTRAST TO OTHER STATES WHICH HAVE ALTERED THEIR DEATH-PENALTY REGIMES TO COMPLY WITH THE CONSTITUTIONAL STANDARDS SET FORTH IN *GODFREY*.

The Commonwealth of Virginia stands in stark contrast to other states across the country, which – in response to the Court's series of holdings requiring implementation of "clear and objective" standards for sentencers – have modified their vileness aggravators in an attempt to satisfy the requirements of the Constitution. Indeed, the Petition in this case *understates* the extent to which Virginia is out of step.

As explained in the Petition, jurisdictions in which assessment of the death penalty may be premised on an aggravating factor that incorporates the language found unacceptable in *Godfrey* have – with the sole exception of Virginia – limited the reach of that factor through one means or another. *See* Pet. at 17-19. For example, the New Jersey Supreme Court has undertaken to narrow "outrageously or wantonly vile, horrible or inhuman in that [they] involved torture, depravity of mind, or an aggravated assault to the victim." The aggravator is now understood to include only those murders that were not the "product of greed, envy, revenge, or another of those emotions ordinarily associated with murder, and served no purpose for the defendant beyond his pleasure of killing," or in which "the defendant intended to cause, and did in fact cause, severe physical or psychological pain or suffering to the victim prior to the

victim's death." *State v. Ramseur*, 524 A.2d 188, 231 (N.J. 1987). Similarly, under the battery prong of South Dakota's "vileness" factor, that state's highest court has required a "specific intention, design or purpose of maliciously inflicting unnecessary pain" and "infliction of serious physical abuse upon the victim by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." *State v. Moeller*, 548 N.W.2d 465, 490-91 (S.D. 1996); *see also State v. Preston*, 673 S.W.2d 1, 5 (Mo. 1984) (limiting construction of "depravity of mind . . . outrageously or wantonly vile, horrible or inhuman").

In other states with similarly vague aggravators, the courts, citing *Godfrey*, have either invalidated sentencing schemes outright or responded to this Court's direction by imposing a limiting construction. *See, e.g.*, *Jordan v. Watkins*, 681 F.2d 1067, 1082 (5th Cir. 1982) (invalidating "death sentence . . . imposed under guidelines that provided even less guidance to the jury in exercising its sentencing discretion than did those held unconstitutional in *Godfrey*"); *State v. Dicks*, 615 S.W.2d 126, 132 (Tenn. 1981) (narrowing a statutory aggravator which assesses how "heinous, atrocious or cruel" was the murder committed by defendant); *State v. Wood*, 648 P.2d 71, 85 (Utah 1982) (holding that consideration of "the ruthlessness and brutality of the murder" – a factor which was "essentially the same" as that on which the faulty death sentence in *Godfrey* had been based – was unconstitutional) (internal quotation marks omitted); *see also Shell v. Mississippi*, 498 U.S. 1, 1 (1990) (*per curiam*) (reversing decision of Mississippi Supreme Court to the extent that it affirmed a death sentence based on the aggravating factor of being "especially heinous, atrocious or cruel," without a constitutionally sufficient limiting instruction).

Although *amici* do not concede that these systems are constitutionally sufficient in all respects, they sharply contrast with Virginia's utter failure to act in response to this Court's rulings. The Commonwealth's anomalous position – not to mention its disregard for well-established Eighth Amendment law and this Court's precedents – demands this Court's attention.

III. VIRGINIA'S DEATH-PENALTY SCHEME SERIOUSLY BURDENS THE RIGHTS OF CAPITAL DEFENDANTS.

Amici, representing counsel for capital defendants across the country and particularly in Virginia, have first-hand knowledge of the practical impact of Virginia's vileness aggravator on the ability of capital defendants to obtain a fair hearing on all issues of guilt and sentencing. As discussed below, Virginia's current death-penalty scheme unfairly influences the strategic choices defendants make in their efforts to avoid the unjust imposition of the death penalty. As such, the unconstitutionally vague vileness aggravator burdens the constitutional rights of defendants and contravenes the public interest in the full and fair adjudication of criminal cases.

First and most fundamentally, as discussed *supra* Part I, the aggravator as currently phrased could be understood to comprehend all cases of murder; thus, it sweeps in even those defendants who should be ineligible for capital punishment under this Court's jurisprudence. Moreover, the vagueness of the vileness aggravator results in widespread sentencing disparities within Virginia, just the sort of arbitrary and capricious result this Court has feared. Indeed, a state-sponsored study has shown that the factor most relevant to the application of the death penalty throughout the Commonwealth is the geographic location of the crime,

demonstrating that the choices of prosecutors and the character of the jury pool – not principled guidance from the statute or courts – determine who gets the death penalty. *See* Joint Legislative Audit and Review Commission of the Virginia General Assembly, Review of Virginia's System of Capital Punishment (2001) at 43 ("The location of the offense has the strongest effect on the probability that a person who commits a capital-eligible offense will face the possibility of the death penalty.").

Second, defendants in Virginia who are not properly eligible for the death penalty under *Godfrey* face juries that are more likely to convict than the average jury panel. Because it is constitutionally permissible for a court to exclude from capital juries those potential jurors who maintain an absolute objection to the death penalty, *see Lockhart v. McCree*, 476 U.S. 162 (1986), and because Virginia state law provides for the use of the same jury in both the guilt and sentencing phases of a capital trial, *see* Va. Code Ann. § 19.2-264.3(C); *Watkins v. Commonwealth*, 331 S.E.2d 422, 431 (Va. 1985), individuals against whom the state plans to seek the death penalty face "death-qualified" juries not only during the sentencing phase of their trials, but at the guilt phase as well. Although facing a death-qualified jury at the guilt phase may not, by itself, violate the Constitution, *see, e.g.*, *Buchanan v. Kentucky*, 483 U.S. 402 (1987), substantial evidence shows that such juries are more likely to convict than non-death qualified juries. *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFFALO L. REV. 469, 494 n.109 (1996) (citing studies). Defendants in Virginia should not be so prejudiced because of the Commonwealth's recalcitrance in providing adequate standards for imposition of the death penalty.

Third, the all-encompassing nature of Virginia's vileness aggravator places no manageable limits on evidence admissible at the sentencing phase. Pursuant to Virginia state law, at the sentencing phase of a capital trial, "evidence may be presented as to any matter which the court deems relevant to sentence." Va. Code Ann. § 19.2-264.4. Because any capital murder might be considered "vile" for any number of reasons under Virginia's undifferentiated standard, an overwhelming range of evidence could be deemed relevant to the sentence. Defense counsel in capital cases have no guidance in preparing the substance of their defense during the sentencing phase. Virginia law requires the state to give a defendant notice only of its intention "to introduce . . . evidence of defendant's unadjudicated criminal conduct." *Id.* § 19.2-264.3:2. As the state is under no obligation to inform the defendant of other evidence to be adduced at sentencing, and because almost anything could be relevant to a determination of vileness under Virginia's death-penalty regime, the defense may be critically disadvantaged in its preparation of rebuttal evidence.

Fourth, the wide sweep of the vileness aggravator undoubtedly forces many defendants in Virginia – whether or not they are properly eligible for the death penalty pursuant to *Godfrey* – to forfeit their right to contest their innocence at trial. Defendants may naturally fear going to trial, even where they have a meritorious claim of innocence, because of the threat of an unwarranted death sentence. It can hardly be doubted that the prospect of execution constitutes a major disincentive for a defendant to challenge his guilt, at least where he is able to opt out of the process. *See, e.g.*, *United States v. Quinones*, 313 F.3d 49, 59 (2d Cir. 2002). Moreover, "if the death penalty remains a possibility during trial, a defendant may be forced into trial tactics that

are designed to avoid the death penalty but that have the consequence of making conviction more likely." *Id.*

In each of these ways, Virginia's vague death-penalty scheme undermines not only the full and fair adjudication of criminal matters and contravenes not only defendants' rights but also the public's interest in fair proceedings for all citizens. *See Wade v. Hunter*, 336 U.S. 684, 689 (1949) (recognizing the "public[] interest in fair trials designed to end in just judgments").

IV. THIS CASE PRESENTS A GOOD VEHICLE FOR REVIEW.

Amici agree that Petitioner fully and adequately raised his objections in the courts below. Under Virginia law, "[n]o party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court." Va. Code Ann. § 8.01-384(A). The Virginia courts have stated in the past that "motions made before, during, and after the trial clearly preserve[] this issue for appeal." *Stuarts Draft Shopping Center, L.P. v. S-D Associates*, 468 S.E.2d 885, 888 n.1 (Va. 1996).

The pretrial motion made by Petitioner and ruled on by the trial court thus preserves the issue for appeal. As the Virginia Supreme Court has noted, "[t]he undeniable purpose of Code § 8.01-384(A) is to relieve counsel of the burden of making repeated further objections to each subsequent action of the trial court that applies or implements a prior ruling to which an objection has already been noted." *King v. Commonwealth*, 570 S.E.2d 863, 866 (Va. 2002). Since the trial court had already ruled on Petitioner's motion regarding the constitutional infirmity of

the vagueness aggravator, no "subsequent action" on his part was required.

The Virginia Supreme Court's new rule requiring repeat objections is novel and also fails to serve any legitimate state purpose. Requiring a defendant to renew, after a mistrial, a pretrial motion that had previously been denied is by no means "a firmly established and regularly followed state practice" that may justify denial of "subsequent review by this Court of a federal constitutional claim." *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). Because the ruling by the Virginia Supreme Court on this issue was, at best, a novel procedural rule, it "cannot bar federal review of constitutional claims that have been plainly and reasonably raised." *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 457 (1958) (holding that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.").

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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